Supreme Court, U. S.
FILED
JAN 4 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1645

TRANSAMERICA MORTGAGE ADVISORS, INC. (TAMA); KENT L. COLWELL; J. WENDELL COOMBS; JOHN R. JENSEN; RALPH D. WENGER; JOHN HAVENS; TRANSAMERICA CORPORATION; TRANSAMERICA LAND CAPITAL, INC.; AND MORTGAGE TRUST OF AMERICA,

Petitioners,

—v.—

HARRY LEWIS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONERS

JOHN M. ANDERSON
Counsel for Petitioners
450 Pacific Avenue
San Francisco, California 94133
Telephone: (415) 788-5000

Of Counsel

BRUCE W. HYMAN
MARY BETH UITTI
LANDELS, RIPLEY & DIAMOND
Counsel for Petitioners,
Transamerica Mortgage Advisors, Inc. (TAMA)
Kent L. Colwell
J. Wendell Coombs
John R. Jensen
Ralph D. Wenger

January 2, 1979

(continued)

SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

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Petitioners,

—v.—

HARRY LEWIS,

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the Court of Appeals (A. 28)[1] is reported at 575 F.2d 237 (9th Cir. 1978). The relevant orders of the District Court (A. 24, 26) are not reported.

The majority and dissenting opinions of the Court of Appeals adopt the majority and dissenting opinions of the

1. All "A. . ." references are to the Single Appendix.

Court of Appeals for the Second and Fifth Circuits in *Abrahamson v. Fleschner*, 568 F.2d 862 (2d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978), and *Wilson v. First Houston Investment Corp.*, 566 F.2d 1235 (5th Cir. 1978), respectively. A petition for certiorari has been filed in *Wilson* and is before this Court as Dkt. No. 77-1717.

JURISDICTION

The judgment of the Court of Appeals was entered on April 19, 1978. A petition for a writ of certiorari was filed on May 5, 1978, and was granted on November 6, 1978. The jurisdiction of this Court is based on 28 U.S.C. § 1254(1) (1966).

QUESTION PRESENTED

May a private right of action at law for damages be implied under the Investment Advisers Act of 1940?

STATUTES INVOLVED

Section 206 of the Investment Advisers Act of 1940, 15 U.S.C. § 80b-6 (1971)[2] is set forth in *Addendum A* to this brief. Section 214 of the Investment Advisers Act, 15 U.S.C. § 80b-14 (1971)[3] is set forth in *Addendum B*.

STATEMENT

Petitioners include a real estate investment trust, five individuals, and four corporations.

Mortgage Trust of America—Mortgage Trust of America is a real estate investment trust qualified under applicable provisions of the Internal Revenue Code. (R. 179-180).[4] The Trust's business is limited to investments in real estate, primarily construction and development loans secured by mortgages. (R. 179-180, 182-186, 271-272). None of the Trust's mortgages or other investments have ever been listed on any national or local securities exchange, or offered for trading in any over-the-counter market. (R. 179-180).

The Trustees—The five individual petitioners are trustees of Mortgage Trust of America. The Trust has nine trustees.[5] A majority of the trustees has always been independent of Transamerica Corporation and its subsidiaries. (R. 5-6, 179-181, 271-273).

The Corporations—Transamerica Mortgage Advisors, Inc. (TAMA) is a Delaware corporation and a wholly-owned subsidiary of Transamerica Mortgage Company. Transamerica Mortgage Company is a wholly-owned subsidiary of Transamerica Land Capital, Inc., which in turn is a wholly-owned subsidiary of Transamerica Corporation (R. 179).[6]

TAMA is retained by Mortgage Trust of America as its adviser. The Trust is TAMA's *only* client. TAMA advises the Trust on various real estate investments, and administers the Trust's day-to-day operations. TAMA has never had another client. TAMA has never advertised its serv-

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2. Aug. 22, 1940, c. 686, Title II, § 206, 54 Stat. 852; Sept. 13, 1960, Pub.L. 86-750, §§ 8, 9, 74 Stat. 887.

3. Aug. 22, 1940, c. 686, Title II, § 214, 54 Stat. 856.

4. All "R. . ." references are to the Ninth Circuit Clerk's Record on Appeal, certified and transmitted to this Court on November 13, 1978.

5. All nine trustees of Mortgage Trust of America are named in the complaint, but only Messrs. Colwell, Coombs, Havens, Jensen and Wenger have been served and made parties to the litigation. (R. 3).

6. When this litigation began, Transamerica Mortgage Company was known as Bankers Mortgage Company. Bankers Mortgage was a wholly-owned subsidiary of Bankers Land Investment Corporation, in turn a wholly-owned subsidiary of Transamerica Corporation.

ices, solicited additional clients, or held itself out in any way as a public investment adviser. (R. 271-272).

The Litigation—Harry Lewis filed suit against petitioners in the United States District Court for the Southern District of New York on April 5, 1973. He based jurisdiction on the Investment Advisers Act of 1940.

Lewis's complaint sets forth six claims for relief. The first three are derivative, and the last three purport to be class actions on behalf of Mortgage Trust of America's shareholders. The first (derivative) and fourth (class) allege that petitioners TAMA and Transamerica Corporation failed to register as required by the Investment Advisers Act and that certain fees paid TAMA by the Trust were excessive. The second (derivative) and fifth (class) claims allege unfairness and conflicts of interest in the Trust's purchase of its initial loan portfolio from Transamerica Land Capital. The third (derivative) and sixth (class) claims for relief allege breach of fiduciary duty and breach of trust by TAMA and Transamerica Corporation in rendering investment advice to Mortgage Trust of America. (R. 3-22).

Pursuant to stipulation and applicable provisions of the Judiciary Code,[7] the case was transferred to the Northern District of California in November, 1973.

On March 28, 1974, petitioners asked that the case be dismissed. Petitioners argued that the Investment Advisers Act does not afford a private right of action; that the Act does not apply in any event; and that Lewis had not adequately excused his failure to make demand on the trustees. (R. 240-270).

Petitioners' motions to dismiss were heard September 27, 1974. The District Court concluded that the Investment Advisers Act of 1940 did not afford a private right of action.[8] A formal order dismissing the complaint with leave to amend was entered on October 7, 1974. (A. 24). Lewis declined to amend and the case was dismissed with prejudice on November 21, 1974. (A. 26).

7. *See*, 28 U.S.C. § 1404(b) (1976).

Lewis appealed.

The Court of Appeals (2-1; Wallace, J., dissenting) reversed, and held that "the implication of a private right of action for injunctive relief and damages under the [Investment Advisers Act] in favor of appropriate plaintiffs is necessary to achieve the goals of Congress in enacting the legislation." (A. 31). The majority adopted the reasoning of the majorities in *Abrahamson v. Fleschner*, 568 F.2d 862 (2d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978), and *Wilson v. First Houston Investment Corp.*, 566 F.2d 1235 (5th Cir. 1978).

In dissent, Judge Wallace adopted Judge Gurfein's dissent in *Abrahamson v. Fleschner*, 568 F.2d 862 (2d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978). (A. 32).

Petitioners sought a writ of certiorari. Their petition was granted on November 6, 1978.

SUMMARY OF ARGUMENT

The Investment Advisers Act of 1940 contains no language expressly authorizing a private right of action for money damages. The remedial provisions of the Advisers Act are limited to enforcement actions by the Securities Exchange Commission.

The language of the Advisers Act differs significantly from the other federal securities acts in that, unlike the

8. The District Court did not consider petitioners' other arguments for dismissal, and for that reason the court below declined to rule on those arguments. (A. 30).

other acts, the Advisers Act does not expressly authorize actions at law in the federal courts.

Since Congress did not expressly provide a private right of action under the Advisers Act, the issue is whether this Court may properly *imply* a private right of action for money damages.

The considerations set forth in *Cort v. Ash*, 422 U.S. 66 (1975), lead to the conclusion that it is not appropriate to imply a private right of action for money damages under the Advisers Act. There is no basis for a conclusion that the Act was passed for the "special benefit" of investors seeking money damages. The legislative history indicates that Congress deliberately excluded reference to "actions at law" when the Act was originally enacted and has rejected private damage actions in subsequent amendments to the Act. Implying a private action for money damages under the Act is not "necessary" to effectuate the main purposes of the Act. The SEC already has a wide range of enforcement powers available. Finally, conduct of the sort sought to be prescribed in this action has been traditionally and adequately monitored by the state courts in actions for fraud, negligent misrepresentation and breach of fiduciary duty.

There are, in addition, important practical reasons why a private right of action should not be implied under the Investment Advisers Act. Allowing the maintenance of private actions under the Advisers Act would undermine the limitations on federal securities litigation recently recognized in *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975) and *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976). If, for example, private actions for money damages were authorized under the Advisers Act, a disgruntled investor could bring suit against an investment adviser in federal court without having to show that the

wrongdoing occurred in connection with the purchase or sale of a security, or that the adviser intended to defraud, deceive, or manipulate.

Implying a private right of action under the Investment Advisers Act of 1940 is not warranted by the language of the Act, is not necessary to achieve the purposes of the Act, and would undermine well-reasoned limitations on federal court actions by investors in securities.

ARGUMENT

The Investment Advisers Act of 1940 does not expressly authorize a private right of action at law for damages.[9] The question presented is whether a private right of action at law for damages may be *implied* under the Advisers Act.

In *Cort v. Ash*, 422 U.S. 66 (1975), this Court set forth four factors relevant to determining "whether a private remedy is implicit in a statute not expressly providing one . . ." *Id.* at 78. We will consider each of those factors in the discussion that follows. By way of introduction, however, we respectfully call attention to the special language of the Advisers Act. "The starting point in every case involving construction of a statute is the language itself." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring).

1. Unlike the Other Federal Securities Laws, the Investment Advisers Act Does Not Confer Jurisdiction Over "Actions at Law."

Section 214 of the Investment Advisers Act confers jurisdiction on the state and federal trial courts "of all *suits in*

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9. *See, e.g., Abrahamson v. Fleschner*, 568 F.2d 862, 872 (2d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978); *Wilson v. First Houston Investment Corp.*, 566 F.2d 1235, 1238 (5th Cir. 1978); *Bolger v. Laventhol, Krekstein, Horwath & Horwath*, 381 F. Supp. 260, 262 (S.D.N.Y. 1974); *Sullivan v. Chase Investment Services of Boston, Inc.*, 434 F. Supp. 171, 178 (N.D. Cal. 1977).

equity to enjoin any violation of this subchapter or the rules, regulations, or orders thereunder." (emphasis added). Section 214 does *not* confer jurisdiction over "actions at law."

The distinction is significant.

The Securities Act of 1933, the Securities Exchange Act of 1934, and the Investment Company Act of 1940 all provide that the district courts shall have jurisdiction of "all suits in equity *and actions at law* brought to enforce any liability or duty created by" those Acts. (emphasis added).[10] Comparing the Advisers Act and the Investment Company Act is particularly instructive. Both Acts were introduced at the same time, and may be regarded as companion legislation.[11] The Investment Company Act confers jurisdiction over "actions at law." The Advisers Act does not.

The history of that distinction is also significant.

The SEC's early draft of the Advisers Act simply incor-

10. *See*, Securities Act of 1933, 15 U.S.C. § 77v (1971) [May 27, 1933, c. 38, Title I, § 22, 48 Stat. 86; June 25, 1936, c. 804, 49 Stat. 1921; June 25, 1948, c. 646, § 32(b), 62 Stat. 991; May 24, 1949, c. 139, § 127, 63 Stat. 107; Aug. 10, 1954, c. 667, Title I, § 11, 68 Stat. 686; Oct. 15, 1970, Pub.L. 91-452, Title II, § 213, 84 Stat. 929]; Securities Exchange Act of 1934, 15 U.S.C. § 78aa (1971) [June 6, 1934, c. 404, § 27, 48 Stat. 902; June 25, 1936, c. 804, 49 Stat. 1921; June 25, 1948, c. 646, § 32(b), 62 Stat. 991; May 24, 1949, c. 139, § 127, 63 Stat. 107]; The Investment Company Act of 1940, 15 U.S.C. § 80a-43 (1971) [Aug. 22, 1940, c. 686, Title I, § 44, 54 Stat. 844; Dec. 14, 1970, Pub.L. 91-547, § 22, 84 Stat. 1430].

See also, the Public Utility Holding Company Act of 1935, 15 U.S.C. § 78y (1978 Supp.) [June 6, 1934, c. 404, § 25, 48 Stat. 901; June 7, 1934, c. 426, 48 Stat. 926; June 25, 1948, c. 646, § 32(a), 62 Stat. 991; May 24, 1949, c. 139, § 127, 63 Stat. 107; Aug. 28, 1958, Pub.L. 85-791, § 10, 72 Stat. 945; June 4, 1975, Pub.L. 94-29, § 20, 89 Stat. 158]; The Trust Indenture Act of 1939, 15 U.S.C. § 77vvv (1971) [May 27, 1933, c. 38, Title III, § 322, as added August 3, 1939, c. 411, 53 Stat. 1175]. The Public Utilities Holding Company Act and the Trust Indenture Act confer jurisdiction over "all suits in equity *and actions at law* brought to enforce any liability or duty created . . ." (emphasis added).

11. S. Rep. No. 91-184, 91st Cong., 1st Sess. 43-44 (1969).

porated a provision of the Investment Company Act conferring jurisdiction over "actions at law."[12] However, the final draft of the Advisers Act, approved after Senate hearings and negotiations with the SEC, did not include the jurisdiction provision of the Investment Company Act. Instead, the Advisers Act limited jurisdiction to "suits in equity."[13]

In *Abrahamson v. Fleschner*, 568 F.2d 862 (2d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978), the majority attempted to explain the omission of "actions at law" from the Advisers Act. The reason, according to the majority, is that unlike the Advisers Act, "each of the other [federal securities] Acts whose jurisdictional provisions refer to 'actions at law' contains one or more sections *expressly* granting injured parties a private right of action for damages." *Id.* at 874 (emphasis in original) (citations omitted). This required, according to the majority, a provision in each of those Acts conferring jurisdiction over "actions at law." *Id.* at 874-875.[14] The majority's explanation overlooks the fact

12. S. 3580, 76th Cong., 3d Sess., *reprinted in Hearings on S. 3580 Before a Subcomm. of the Senate Comm. on Banking and Currency*, 76th Cong., 3d Sess., pt. 2, at 1 (1940); H.R. 8935, 76th Cong. 3d Sess. (1940). Section 203 of the SEC draft incorporated Section 40 of the Investment Company Act, which in turn incorporated Section 25 of the Public Utility Holding Company Act, 15 U.S.C. § 79y (1971).

13. S. 4108, 76th Cong., 3d Sess. (1940); H.R. 10065, 76th Cong., 3d Sess., *reprinted in Hearings on H.R. 10065 Before a Subcomm. of the House Comm. on Interstate and Foreign Commerce*, 76th Cong., 3d Sess. 1 (1940). Congress enacted the House bill.

14. Essentially the same explanation is offered in *Bolger v. Laventhol, Krekstein, Horwath & Horwath*, 381 F. Supp. 260, 264-265 (S.D.N.Y. 1974) and in *Sullivan v. Case Investment Services of Boston, Inc.*, 434 F. Supp. 171, 181 (N.D. Cal. 1977). In *Wilson v. First Houston Investment Corp.*, 566 F.2d 1235 (5th Cir. 1978) the majority refers to the discussions in *Abrahamson* and *Bolger*, but does not take a position. *Id.* at 1241-1242.

that in each of the sections of the other Acts creating express civil liability, jurisdiction over "actions at law" is conferred in the *same* section.[15] The Securities Act of 1933, for example, provides that "any person acquiring such security . . . may, either at law or in equity, in any court of competent jurisdiction, sue . . ."[16] The omission of "actions at law" from the Advisers Act cannot be explained by a further explanation that those words were necessary in the jurisdiction provisions of the other federal securities acts. *Accord, Abrahamson v. Fleschner,* 568 F.2d 862, 881 n. 6 (2d Cir. 1977), *cert. denied,* 436 U.S. 913 (1978), (Gurfein, J., concurring and dissenting).

We do not suggest that the omission alone of "actions at law" from the Advisers Act prohibits a private right of action for damages. "The canon in favor of strict construction is not an inexorable command to override common sense and evident statutory purpose." *United States v. Brown,* 333 U.S. 18, 25 (1948). But consideration of the special language of the Advisers Act against the background of the Act's history and purpose further supports the conclusion that a private right of action at law for damages was not intended and is not necessary.

2. The Considerations Relevant to the Question of Whether the Investment Advisers Act Allows a Private Action for Damages All Suggest That No Such Right Exists.

In *Cort v. Ash,* 422 U.S. 66 (1975), this Court set forth four considerations relevant in determining whether a

15. *See,* Securities Act of 1933, 15 U.S.C. §§ 77k, 771 (1971); Securities Exchange Act of 1934, 15 U.S.C. §§ 78i(e), 78p(b), 78r (1971); Public Utility Holding Company Act of 1935, 15 U.S.C. §§ 79p(b), 79q(b) (1971); Trust Indenture Act, 15 U.S.C. § 77www(a) (1971); Investment Company Act of 1940, 15 U.S.C. § 80a-29(f) (1971).

16. 15 U.S.C. § 77k(a) (1971).

private remedy is available in a statute not expressly providing one:

> "First, is the plaintiff 'one of the class for whose *especial* benefit the statute was enacted,' . . . ? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or deny one? . . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? . . . And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?" *Id.* at 78 (emphasis in original) (citations omitted).

Consideration of the factors set forth in *Cort v. Ash* leads to the conclusion that the Investment Advisers Act does not afford a private right of action for damages.

(a) There Is No Basis for the Conclusion That the Advisers Act Was Enacted for the Special Benefit of Investors Seeking Money Damages for Violation of the Act.

The federal courts have paid scant attention to the question of whether the Investment Advisers Act was passed for the *special* benefit of investors who retain investment advisers. The federal courts have paid even less attention to whether the Advisers Act was enacted for the special benefit of investors seeking money damages for violation of the Act.

In *Abrahamson v. Fleschner,* 568 F.2d 862 (2d Cir. 1977), *cert. denied,* 436 U.S. 913 (1978), the majority simply concluded that the purpose of the Advisers Act was "to protect the public and investors against malpractice by persons paid for advising others about securities" and "was designed for the 'especial' benefit of persons relying upon

their investment advisers for advice." *Id.* at 873, citing S. Rep. No. 1760, 86th Cong., 2d Sess. 1 (1960) and *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 186-191 (1963). In *Wilson v. First Houston Investment Corp.*, 566 F.2d 1235 (5th Cir. 1978), the majority cited two Congressional reports that speak of protecting "small investors" in support of its conclusion that the plaintiff was "a member of the class of intended beneficiaries of" the Act. *Id.* at 1240. Citing the same two reports, the District Court in *Sullivan v. Chase Investment Services of Boston, Inc.*, 434 F. Supp. 171 (N.D. Cal. 1977), concluded that Congress enacted the Advisers Act "explicitly for the protection of those who employ investment advisory services." *Id.* at 181.[17]

The discussions in *Abrahamson, Wilson* and *Sullivan* demonstrate that the question of the Advisers Act's special beneficiaries is closely interwoven with the question of whether Congress intended to create a private action for damages. In *Wilson*, for example, the majority speaks of the Act's "intended" beneficiaries. *Wilson v. First Houston Investment Corp.*, 566 F.2d 1235, 1240 (5th Cir. 1978). As will be seen, there is little or no indication Congress intended to create a private action for damages for violation of the Act. See discussion following at pages 14-21.

There can be no doubt that one basic purpose of the Advisers Act is to protect investors who retain investment advisers. There is ample authority to support that conclu-

17. In *Bolger v. Laventhol, Krekstein, Horwath & Horwath*, 381 F. Supp. 260 (S.D.N.Y. 1974), the only other reported decision which fully considers whether the Advisers Act affords a private action for damages, the District Court had no occasion to consider whether the Act was adopted for the special benefit of the plaintiffs in that case. *Cort v. Ash*, 422 U.S. 66 (1975), and the considerations it prescribes, were not announced until a year later.

sion.[18] But there is a distinction between a statute's goals and the means chosen to reach those goals. A conclusion that the purpose of the Advisers Act is to protect investors who use investment advisers does not, without more, endow those investors with the right to sue for money damages in the federal courts. Congress "may intend a statute to protect investors—but not necessarily without limit." *Abrahamson v. Fleschner*, 568 F.2d 862, 882 (2d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978) (Gurfein, J., concurring and dissenting). The purpose of the Advisers Act may well be satisfied *even though* the Act does not afford a private action for money damages.[19]

To conclude that the Advisers Act is intended to protect investors who retain investment advisers does not mean that a plaintiff seeking money damages is "one of the class for whose 'especial' benefit the statute was enacted." *Cort v. Ash*, 422 U.S. 66, 78 (1975). The Act's intent may well be satisfied by its disclosure requirements and SEC enforcement. The language of the Advisers Act suggests that Congress has come to that conclusion. See discussion above at pages 7-10.

18. *See, e.g.*, H.R. Rep. No. 2639, 76th Cong., 3d Sess. 28 (1940); S. Rep. No. 1775, 76th Cong., 3d Sess. 21 (1940); S. Rep. No. 1760, 86th Cong., 2d Sess. 1 (1960).

19. The first reported case involving a private claim for damages under the Advisers Act appears to be *Brouk v. Managed Funds, Inc.*, 286 F.2d 901 (8th Cir. 1961), *vacated as moot*, 369 U.S. 424 (1962), where the issue here was presented but not decided. The next reported case involving a private claim for damages under the Act appears to be *Schlusselberg v. Werly*, [1966-1967 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 92,012, 96,436 (S.D. N.Y. 1967). *Schlusselberg*, like several cases that followed, granted relief on other grounds, principally the Securities Exchange Act of 1934. Not until 1974 do we find discussion of whether the Advisers Act permits a private action for damages. *See, Gammage v. Roberts, Scott & Co.*, [1974-1975 Transfer Binder] CCH Fed.Sec. L.Rep. ¶ 94,761, 96,503, (S.D. Cal. 1974); *Greenspan v. Del Toro*, [1975-1976 Transfer Binder] CCH Fed.Sec.L.Rep., ¶ 95,488, 99,459 (S.D. Fla. 1974).

The majority opinions in *Abrahamson* and *Wilson* and the District Court's opinion in *Sullivan* pay ample attention to the basic purposes of the Advisers Act, but little or no attention to whether investors seeking money damages for alleged violations of the Act were intended to be among its special beneficiaries.

That the Act was intended to protect investors using investment advisers does not mean that the Act opened the federal courts to actions for money damages by disgruntled clients of investment advisers. The basic purposes of the Act may well be satisfied by a variety of remedies already available. For example, if the respondent here were able to allege intentional misrepresentation in connection with his purchase of stock in Mortgage Trust of America, he would have access to the federal courts under Section 10(b) of the Securities Exchange Act of 1934.[20]

There is little reason to conclude that the Investment Advisers Act was passed for the special benefit of investors seeking money damages for violation of the Act. Further analysis leads the other way.

(b) There Is No Clear Indication That Congress Intended to Create a Private Action for Money Damages for Violation of the Investment Advisers Act.

The second factor to be considered in determining whether the Advisers Act provides a right of action for money damages is legislative intent. *Cort v. Ash*, 422 U.S. 66, 78 (1975). Here, the evidence of legislative intent can lead to only one conclusion: the Investment Advisers Act does not provide a private right of action for money damages.

20. *See*, 15 U.S.C. § 78j(b) (1971); *and see, Affiliated Ute Citizens v. United States*, 406 U.S. 128 (1972); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976).

When the Advisers Act was introduced in 1940, the SEC's chief counsel testified that the Act's "basic approach" was to obtain "a compulsory census." *Hearings on S. 3580 Before a Subcomm. of the Senate Comm. on Banking and Currency*, 76 Cong., 3d Sess. 48.

> "We first would like to find out how many people are engaged in this business, what their connections are, what is the extent of their authority, what is their background, who they are, and how they handle the people's funds." *Id.*

There is no indication that the SEC regarded a private right of action for money damages as even relevant to its "compulsory census." Nor do we find any indication that Congress considered a private damage action an appropriate part of the Advisers Act.

Quite the opposite is true.

The SEC's initial draft of the Advisers Act incorporated a provision of the Investment Company Act conferring jurisdiction over "all suits in equity and *actions at law*."[21] Following hearings in the Senate, industry representatives met with the SEC and negotiated numerous changes.[22] The changes included the addition of a separate

21. *See*, S. 3580, 76th Cong., 3d Sess., *reprinted in Hearings on S. 3580 Before a Subcomm. of the Senate Comm. on Banking and Currency*, 76th Cong., 3d Sess. § 203 (1940). Section 203 incorporated Section 40 of the proposed Investment Company Act, which in turn incorporated Section 25 of the Public Utility Holding Company Act of 1935, 15 U.S.C. § 79y (1971). See discussion above at pages 8-9.

22. *See, Hearings on H.R. 10065 Before a Subcomm. of the House Comm. on Interstate and Foreign Commerce*, 76th Cong., 3d Sess. 72, 95 (1940); 76 Cong. Rec. 10069 (1940) (remarks of Senator Wagner). A spokesman for the investment industry, recognizing that he was "not a disinterested commentator," has written a detailed account of the enactment of the Investment Company Act and Investment Advisers Act. *See*, Jaretski, *The Investment Company Act of 1940*, 26 Wash.L.Q. 303 (1941).

jurisdiction provision. The provision refers to "suits in equity" but *omits* reference to "actions at law." S. 4108, 76th Cong., 3d Sess. (1940); H.R. 10065, 76th Cong., 3d Sess., *reprinted in Hearings on H.R. 10065 Before a Subcomm. of the House Comm. on Interstate and Foreign Commerce,* 76th Cong., 3d Sess. 1 (1940).

There are various indications that the Advisers Act, as enacted, was a compromise between the SEC and the investment advisory industry.[23] Among the changes, the deletion of "actions at law" from the original draft of the Act is important. It was the only change directly relevant to the issue here. The original draft referred to jurisdiction over "actions at law." The final draft did not. "There is," Mr. Justice Swayne once said, "no surer way to find out what parties meant, than to see what they have done." *Brooklyn Life Insurance Co. v. Dutcher*, 95 U.S. 269, 273 (1877).

There is another important omission from the Advisers Act, which is further indication that Congress never intended to create a private action for money damages. Unlike the other federal securities acts, the Advisers Act does not provide *any* express civil liability in damages. We agree with Judge Gurfein that this omission is "highly relevant."

> "[I]n *each* of the other Acts Congress itself did provide for some *express* civil liability, yet under the Advisers Act it failed to include a single section imposing liability for damages. Congress, for example, could have provided an express damage remedy for misrepresentations in the registration statement of the advisers as it did for misrepresentations of the registration statement of the underwriter, 15 U.S.C. § 77k (a)(5). This indicates rather that, in its cautious approach to the regulation of investment advisers, Congress was not yet ready to impose *any* civil liability for damages." *Abrahamson v. Fleschner*, 568 F.2d 862, 881 (2d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978) (Gurfein, J., concurring and dissenting) (emphasis in original).

23. *Accord*, Note, *Private Causes of Action Under Section 206 of the Investment Advisers Act*, 74 Mich.L.Rev. 308, 319-320, n.69 (1975).

The majority in *Wilson* conceded that Judge Gurfein's explanation was "plausible" but concluded that the legislative history of the Advisers Act offers "no substantial assistance . . . with respect to Congress' intentions." *Wilson v. First Houston Investment Corp.*, 566 F.2d 1235, 1242 (5th Cir. 1978). That conclusion appears to ignore the legislative history of the Act—legislative history which belies argument that the Advisers Act authorizes private actions for money damages.

1960 Legislation—Between 1956 and 1959, the SEC submitted numerous proposals to Congress relating to the federal securities laws, including amendments to the Investment Advisers Act. S. Rep. No. 1760, 86th Cong., 2d Sess. 2 (1960). None of the proposed amendments added to the Act's limited grant of jurisdiction over "suits in equity" set forth in Section 214.[24] Nor did any of the 19 changes to 11 of the Act's 21 sections approved by Congress in 1960 alter Section 214.

The 1960 amendments strengthened the enforcement powers of the SEC.[25] It empowered the Commission to deny,

24. The SEC was apparently aware of the issue here as early as 1957. In *Hull v. Newman, Kennedy & Co.*, U.S.D.C., S.D.N.Y., 57 Civ. 118-283 (settled), referred to at 24 SEC Ann. Rep. 162 (1959), the SEC filed an *amicus* brief supporting the recognition of private actions to enforce the Advisers Act.

25. "A major concern of the [amendments] is to aid the *Commission* in enforcing compliance with the act." S.Rep.No. 1760, 86th

delay or cancel an individual's registration as an investment adviser if the adviser failed to meet tightened registration qualifications. Pub.L. No. 86-750, §§ 2, 3, 4 & 5, 74 Stat. 885, *amending* § 203 of the Act, 15 U.S.C. § 80b-3 (1971). It empowered the SEC to promulgate rules requiring advisers to keep certain books and records and to make those books and records available for inspection by the Commission. Pub.L. No. 86-750, § 6, 74 Stat. 885, *amending* § 204 of the Act, 15 U.S.C. § 80b-4 (1971). It extended the antifraud provisions of Section 206 to all investment advisers, whether or not registered with the Commission. Pub.L. No. 86-750, § 8, 74 Stat. 885, *amending* § 206 of the Act, 15 U.S.C. § 80b-6 (1971). Section 209, entitled "Enforcement of Title," was amended to allow the *Commission* to obtain an *injunction* against aiders and abettors as well as principal violators. Pub.L. No. 86-750, § 12, 74 Stat. 885. No provision was made for actions at law against aiders and abettors—an omission indicating a deliberate decision by Congress to ensure that no private action for money damages would be implied as was implied under Section 10(b) of the 1934 Act.

Congress considered enforcement of the Advisers Act in 1960, and came to the conclusion that the SEC was in the best position to enforce its limited provisions. Respondents would have this Court disregard that conclusion and create a remedy where none exists.

1970 Legislation—In 1970 Congress amended the Investment Company Act and the Advisers Act. The amendments included the addition of a private right of action against

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Cong., 2d Sess. 4 (1960) (emphasis added). The Senate Report further explains that, unlike the other federal securities statutes, the Advisers Act has few substantive or regulatory provisions, and, like the broker-dealer registration provisions of the 1934 Act, "resembles a continuing census of the Nation's investment advisers." *Id.* at 2.

certain investment advisers under the Investment Company Act, but *no* additional remedies under the Advisers Act. Public Law No. 91-547, 84 Stat. 1413, *adding* § 36(b) of the Investment Company Act, 15 U.S.C. § 80a-35(b) (1971). Having considered the liability of investment advisers and having made no provision under the Advisers Act for their liability in money damages, Congress almost certainly intended that no such remedy exist, a conclusion supported by its description of the Act's limited objectives.

> "The Investment Advisers Act of 1940 is a companion statute to the Investment Company Act. It regulates the activities of those who receive compensation for advising others with respect to investments in securities or who are in the business of issuing analyses or reports concerning securities. Like other Federal securities statutes, the Advisers Act prohibits fraudulent practices and requires those subject to its provisions to register with the Commission and to keep books and records in accordance with Commission rules. It also empowers the Commission to make regular inspections and to take administrative remedial action against applicants for registration and registered advisers." S. Rep. No. 91-184, 91st Cong., 1st Sess. 43-44 (1969).

The statements and actions of Congress attending the 1970 amendments to the Investment Company Act and Advisers Act offer no support for the respondent here.

1976 Legislation—In 1976 an amendment to the Advisers Act expressly conferring jurisdiction over "all suits in equity *and actions at law*" was introduced by the SEC. S. 2849, 94th Cong., 2d Sess. § 6 (1976) (emphasis added); *and see*, [1975-1976 Transfer Binder] CCH Fed. Sec.L.Rep. ¶ 80,341, 85,895 (SEC Investment Advisers Act Release No. 491, December 15, 1975). The bill was reported out of a

Senate committee,[26] but did not come to a vote. Professor Loss testified that the amendment would not create a private action for damages, but would simply facilitate its implication by the courts.[27] Professor Loss's explanation may be open to question. One does not think of an act of Congress as a garden for implications. But the tacit admission in the proposed amendment is apparent: the Advisers Act does *not* provide a private right of action for money damages.

1977 Legislation—The 1976 amendments were reintroduced in January, 1977. Again, the amendments explicitiy provided that the federal district courts would have jurisdiction of "all suits in equity and *actions at law.*" H.R. 2105, 95th Cong., 1st Sess. § 7 (1977) (emphasis added). There have been no hearings on the bill. The SEC has apparently decided not to pursue enactment, but has stated that it might consider instead studies of investment advisers as "an alternative to legislation at this time."[28]

Legislative history can be ambiguous, and we are not unmindful of the limits inherent in "mute intermediate legislative maneuvers."[29] But we are aware of no clear evidence of Congressional intent to create a private action for money damages under the Advisers Act.

In *National Railroad Passenger Corp. v. National Ass'n of Railroad Passengers*, 414 U.S. 453 (1974) (*"Amtrak"*) this Court held that where a statute provides a particular

26. *See*, S. Rep. No. 910, 94th Cong., 2d Sess. (1976).

27. *Hearings on S. 2849 Before the Subcomm. on Securities of the Senate Comm. on Banking, Housing and Urban Affairs*, 94th Cong., 2d Sess. 232-233 (1976).

28. *See*, BNA, Sec.Reg. & L.Rep., No. 392, at A-12 (March 2, 1977).

29. *Trailmobile Co. v. Whirls*, 331 U.S. 40, 61 (1947).

remedy, other means of enforcement are precluded. *Id.* at 458. The holding in *Amtrak* was followed in *Securities Investor Protection Corp. v. Barbour*, 421 U.S. 412 (1975), where this Court, quoting *Amtrak*, ruled that the inclusion of an alternate remedy could only be based on "clear . . . evidence of legislative intent." *Id.* at 419.

No such evidence exists.

Here, the only conclusions one may reasonably draw from the legislative history of the Advisers Act are that (1) Congress intended to survey and monitor investment advisers and (2) Congress assigned that task to the SEC. There is little or no evidence, let alone "clear" evidence, that Congress intended to enforce the Advisers Act by creating a private right of action for money damages. There is no evidence, let alone "clear" evidence, that Congress intended to open the federal courts to every disgruntled client of every investment adviser.

(c) Implying a Private Action for Damages Under the Advisers Act Is Not Necessary to Fulfill the Main Purposes of the Act.

The main or "underlying purposes" of the Investment Advisers Act is the third factor to be considered in determining whether the Act provides a private action for damages. *Cort v. Ash*, 422 U.S. 66, 78 (1975).

The main purposes of the Advisers Act are an aspect of Congressional intent. The second and third factors described in *Cort v. Ash* are closely related. For example, in *Wilson v. First Houston Investment Corp.*, 566 F.2d 1235 (5th Cir. 1978) the majority concluded that "Congress sought to protect investors" by regulating the investment advisory industry. *Id.* at 1242. That conclusion is then relied upon for the further conclusion that "a private right

of action for damages . . . is consistent with the remedial purposes contemplated by Congress." *Id.*[30]

Here, the evidence relevant to Congressional intent leads away from any conclusion that the Advisers Act provides a private right of action for money damages. See discussion above at pages 14-21. In Judge Gurfein's words, "Whatever evidence exists looks the other way." *Abrahamson v. Fleschner,* 568 F.2d 862, 883 (2d Cir. 1977), *cert. denied,* 436 U.S. 913 (1978) (Gurfein, J., concurring and dissenting). To the extent that the main purposes of the Advisers Act are an aspect of Congressional intent, there is little basis for an argument that the Act provides a private right of action for money damages.

Separating the stated purposes of the Advisers Act from conclusions about Congressional intent leads to the same conclusion, namely, that the purposes of the Act can be met without implying a private right of action for damages.

(1) The "basic approach" of the Advisers Act according to the SEC was to effect a "compulsory census" and the registration of investment advisers with the SEC. *Hearings on S. 3580 Before the Subcomm. of the Senate Comm. on Banking and Currency,* 76th Cong., 3d Sess. 48 (1940).[31] Allowing a private investor to seek money damages in the federal courts from an investment adviser that had failed

30. In *Sullivan v. Chase Investment Services of Boston, Inc.,* 434 F.Supp. 171 (N.D. Cal. 1977), the District Court discussed the Act's main purposes at length. *Id.* at 182-183. But the discussion is largely dependent on a previous discussion of legislative intent. The District Court states, for example, that "[a]s previously discussed, the primary purpose of the Investment Advisers Act was to protect the investing public." *Id.* at 183.

31. The census-taking and registration features of the Advisers Act were repeatedly emphasized in the Senate Hearings. *See, e.g., Hearings on S. 3580 Before the Subcomm. of the Senate Comm. on Banking and Currency,* 76th Cong., 3d Sess. 51, 319 (1940).

to register would seem to be unnecessary and ill-advised—even apart from the always difficult questions of reliance and causation.

(2) Another announced purpose of the Advisers Act is to protect investment advisers from the adverse effects of disclosure that the adviser is being investigated by the SEC.

> "In order to safeguard against this danger section 210(a) and (b) [15 U.S.C. § 80b-10] provide that there shall not be any disclosure of any investigation by the Securities and Exchange Commission until it has made up its mind that a public hearing is to be held. Then in order to safeguard them further, subsection (c), provides that the Commission cannot ask these investment counsellors to disclose their clients, and what their investments are, except if there is some indication of wrongdoing. Thereafter . . . they have to make the disclosure." *Hearings on H.R. 10065 Before the Subcomm. of the House Comm. on Interstate and Foreign Commerce,* 76th Cong., 3d Sess. 138 (1940).

The argument that the Advisers Act provides a private right of action for damages ignores the protection embodied in Section 210 of the Act, a provision which protects investment advisers during an SEC investigation. Section 210 "belies any intention by Congress to open wide private civil complaints which, in the nature of our adversary proceedings, become public property at once." *Abrahamson v. Fleschner,* 568 F.2d 862, 886 (2d Cir. 1977), *cert. denied,* 436 U.S. 913 (1978) (Gurfein, J., concurring and dissenting).

(3) Assuming a main purpose of the Advisers Act is to protect the public and investors from unscrupulous or negligent investment advisers,[32] it does *not* follow that the Act

32. *See, e.g., Abrahamson v. Fleschner,* 568 F.2d 862, 873 (2d Cir. 1977), *cert. denied,* 436 U.S. 913 (1978); *Wilson v. First Houston Investment Corp.,* 566 F.2d 1235, 1242 (5th Cir. 1978); *Bolger v. Laventhol, Krekstein, Horwath & Horwath,* 381 F.Supp. 260, 263 (S.D.N.Y. 1974).

authorizes a private right of action of any kind. As discussed above, there is an important distinction between a statute's goals and the means chosen to reach those goals. See discussion above at pages 11-14. There are various indications—the special language, a cautious approach, the Act's legislative history—that Congress deemed the registration and disclosure provisions of the Advisers Act adequate for the Act's main purposes.[33]

(4) Even if one assumed for argument that a private action for damages is consistent with the underlying purposes of the Advisers Act, there is no evidence to suggest that a private damage action is *necessary*. A private damage action may well be consistent with the general purposes of a statute, but is not necessary to reach the statute's objectives. The distinction is important.

In *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1 (1977), this Court considered whether a private right of action for damages was *necessary* to enforce the Williams Act of 1968, 15 U.S.C. § 78n(e) (1971). The opinion suggests that once a court has identified the legislative purpose, it must determine whether "the creation by judicial interpretation of [an] implied cause of action . . . is *necessary* to effectuate Congress' goals." *Piper v. Chris-Craft Industries, Inc., supra* at 24-26 (emphasis added).

Here, a private action for money damages is by no means *necessary* to protect the public and investors from unscrupulous or negligent investment advisers. That objective is reached through a variety of powers and remedies already available to the SEC. *See, e.g.*, 15 U.S.C. § 80b-3(e) (1971) (denial or revocation of registration); 15 U.S.C. § 80b-4

33. *Accord*, Note, *Securities Law—Investment Adviser Fraud —A Private Damages Remedy Is Implied Under Section 206 of the Investment Advisers Act of 1940*, 30 Vand.L.Rev. 905, 919 (1977).

(1971) (examination of records); 15 U.S.C. § 80b-9(e) (1971) (authority to enforce compliance). The Advisers Act is limited legislation aimed at a small facet of the financial community. A private action for money damages under the Advisers Act is no more *necessary* than a private right of action in favor of broker-dealer customers under the Security Investor Protection Act,[34] tender offerors under the Williams Act,[35] train passengers under the Rail Passenger Act of 1970;[36] or investors of a corporation alleged to have made political contributions in violation of the Federal Election Campaign Act.[37]

(d) Actions for Misrepresentation or Nondisclosure and Actions for Breach of Fiduciary Duty Are a Mainstay of State Court Litigation.

The final factor to be considered in determining whether a private right of action may be implied from a statute not expressly providing one is whether the cause of action alleged is "traditionally relegated to state law, in an area basically the concern of the States, . . ." *Cort v. Ash*, 422 U.S. 66, 78 (1975).

Here, respondent Harry Lewis has alleged six claims for relief. The first three are derivative and the last three purport to be class actions on behalf of the shareholders of Mortgage Trust of America. The first (derivative) and fourth (class) allege that TAMA and Transamerica Corporation failed to register as required by the Investment Advisers Act, and that certain fees paid to TAMA by the

34. *See, Securities Investor Protection Corp. v. Barbour*, 421 U.S. 412 (1975).

35. *See, Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1 (1977).

36. *See, National Railroad Passenger Corp. v. National Association of Railroad Passengers*, 414 U.S. 453 (1974) (*"Amtrak"*).

37. *See, Cort v. Ash*, 422 U.S. 66 (1975).

Trust were excessive. The second (derivative) and fifth (class) claims allege unfairness and conflicts of interest in the Trust's purchase of its initial loan portfolio. The third (derivative) and sixth (class) claims allege breach of fiduciary duty and breach of trust by TAMA and Transamerica Corporation in rendering investment advice to Mortgage Trust of America. (A. 3-21).

None of respondent's allegations are foreign to state practice. On the contrary, allegations of misrepresentation, willful concealment of material facts, and breach of fiduciary duty are a mainstay of state court litigation. *See, e.g.*, 37 C.J.S. *Fraud* §§ 1-3 (1943); Prosser, *Law of Torts* §§ 105-106, 683-694 (4th ed. 1971); 4 Witkin, *Summary of California Law*, §§ 445-446, 2710-2711 (8th ed. 1974).

Actions by beneficiaries against trustees for breach of fiduciary duty are especially familiar to the state courts. Included with this brief at *Addendum C* is a selection of reported cases in New York and California since 1940 in which it was alleged that one or more trustees breached a fiduciary duty owed to a trust and its beneficiaries. The discussions in numerous authorities further attest to the fact that claims of the type made by Harry Lewis in this case are a staple feature of state court litigation. *See, e.g.*, 76 Am. Jur. 2d *Trusts* §§ 315-323, 534-544 (1975); Restatement of Trusts § 170 (Appendix) (1959); II Scott, *The Law of Trusts* § 170, 1297-1299 (1967).

In *Wilson v. First Houston Investment Corp.*, 566 F.2d 1235 (5th Cir. 1978) the majority suggests that implying a private right of action for money damages under the Advisers Act would overcome the obstacles to recovery in a common law action for fraud. *Id.* at 1242. The majority opinion assumes that the Advisers Act eases an investor's proof of wrongdoing by an investment adviser—an assumption that begs the question. The majority in *Wilson* also overlooks the familiar rule that an investment adviser owes his or her client a fiduciary duty.[38] The existence of that duty alone eases the burden of proving common law deceit.[39] The Advisers Act is irrelevant to the burden of proof.

That the Advisers Act is aimed at regulation of investment advisers on a national scale[40] does not mean the Act created a *private* federal right of action. That Congress has passed legislation regulating tender offers on a national scale does not mean that offerors enjoy a private right of action under the Williams Act for money damages. *See, Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1 (1977). Again, there is a distinction between intention and means, objectives and method.

Finally, it has been suggested that since only 27 states have anti-fraud statutes regulating investment advisers, with only one statute providing a private remedy, implication of a private action for damages under the Advisers Act would be appropriate. *See, Sullivan v. Chase Investment Services of Boston, Inc.*, 434 F.Supp. 171, 184 (N.D. Cal. 1977).[41] The suggestion appears to ignore remedies readily available at common law, and what may well be an advan-

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38. *See, e.g., Twomey v. Mitchum, Jones & Templeton, Inc.*, 262 Cal.App.2d 690, 69 Cal.Rptr. 222 (1968); *Walsh v. Hooker & Fay*, 212 Cal.App.2d 450, 28 Cal.Rptr. 16 (1963); *Walston & Co. v. Miller*, 100 Ariz. 48, 410 P.2d 658 (1966). *See also, Galfand v. Chestnutt Corp.*, 545 F.2d 807 (2d Cir. 1976); *Rosenfeld v. Black*, 445 F.2d 1337 (2d Cir. 1971).

39. *See*, 37 C.J.S. *Fraud* § 95, 401 (1943); 34 Cal.Jur.3d *Fraud and Deceit* § 79, 722-726 (1977). *See also, Solon v. Lichtenstein*, 39 Cal.2d 75, 244 P.2d 907 (1952); *Moe v. Transamerica Title Ins. Co.*, 21 Cal.App.3d 289, 98 Cal.Rptr. 547 (1971).

40. *See*, S. Rep. No. 1775, 76th Cong., 3d Sess. 21 (1940).

41. The state statutes regulating investment advisers are collected at Note, *Private Causes of Action Under Section 206 of the Investment Advisers Act*, 74 Mich.L. Rev. 308, 324, n. 103 (1975).

tage at common law to the investor plaintiff alleging fraud. See discussion above at pages 26-27. If indeed the purpose of the Advisers Act is "to protect the public and investors against malpractice by persons paid for advising others about securities."[42] the common law offers a formidable arsenal of precedents, presumptions and remedies.

3. Implying a Private Right of Action for Damages Under the Advisers Act Would Destroy the Limitations on Private Actions by Investors Recently Recognized by This Court.

In *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975) this Court recognized an important limitation on actions by investors under the Section 10(b) of the Securities Exchange Act of 1934.[43] In *Blue Chip Stamps*, it was held that unless the investor plaintiff could establish that the alleged wrongdoing was committed in connection with the purchase or sale of a security, the investor could not maintain a private action for money damages under Section 10(b) and Rule 10b-5. *Id.* at 749. In *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976) the Court stated another important limitation on Section 10(b) actions and held that a private action for damages would not lie under Section 10(b) and Rule 10b-5 absent an allegation by the investor that the defendant intended to defraud, deceive or manipulate. *Id.* at 193.

These two important limitations stand astride the Investment Advisors Act, and are among the more important practical reasons why the Act should not afford investors a right of action for money damages. Simply stated, the

42. *Abrahamson v. Fleschner*, 568 F.2d 862, 873 (2d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978), quoting S. Rep. No. 1760, 86th Cong., 2d Sess. 1 (1960).

43. 15 U.S.C. § 78j(b) (1971).

majorities in *Abrahamson*,[44] *Wilson*[45] and the court below[46] have authorized securities litigation in the federal courts without boundaries. The majorities in *Abrahamson*, *Wilson* and the court below have undermined well-reasoned limitations on access to the federal courts by investors in securities.

Section 206 of the Advisers Act, set forth at *Addendum A*, declares unlawful certain actions by investment advisers without regard to whether those actions are "in connection with the purchase or sale of any security . . ."[47] This would open the federal courts, as it did in *Abrahamson*, to claims by investors who could only allege that they had been induced *not* to sell certain securities.[48] As Judge Gurfein explained in dissent, the majority "holds that the 10b-5 claim is without merit, yet on the *same* factual allegations . . . supports a § 206 claim."[49] Implying a private right of action under the Advisers Act "circumvents the sound policies behind restrictions on 10b-5 claims."[50]

The majority in *Abrahamson* considered the purchaser-seller requirement of Section 10(b) and explained that it "was based on the *express language* of Section 10(b) and

44. *Abrahamson v. Fleschner*, 568 F.2d 862 (2d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978).

45. *Wilson v. First Houston Investment Corp.*, 566 F.2d 1235 (5th Cir. 1978).

46. *Lewis v. Transamerica Corp.*, 575 F.2d 237 (9th Cir. 1978) *cert. granted*, ... U.S. ....., 99 S. Ct. 348 (1978). (A. 28-32).

47. *Compare* 15 U.S.C. § 78j(b) (1971) (Section 10(b) of the Securities Exchange Act of 1934) *with* 15 U.S.C. § 80b-6 (1971) (Section 206 of the Investment Advisers Act of 1940).

48. *Abrahamson v. Fleschner*, 568 F.2d 862, 868 (2d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978).

49. *Id.* at 884 (Gurfein, J., concurring and dissenting) (emphasis in original).

50. *Id.*

Rule 10b-5 requiring a fraud 'in connection with the purchase or sale of any security.' "[51] No such requirement appears in Section 206 of the Advisers Act, and the majority concluded that the purchaser-seller requirement was regarded by this Court as applicable only to 10b-5 actions.[52]

In dissent Judge Gurfein speculated that the concern underlying the purchaser-seller requirement "is the sheer inability to disprove what a plaintiff says he *would have* done if he had but known the truth."[53]

> "There is a distinct danger that, by implying an open-ended private right of action, the court is giving the clients of investment advisers *carte blanche* to convert themselves from victims to defrauders." *Abrahamson v. Fleschner*, 568 F.2d 862, 884 (2d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978) (Gurfein, J., concurring and dissenting).

Judge Gurfein's remarks are pertinent here.

Of the 15 Adviser Act suits against advisers to real estate investment trusts known to petitioners, 11 appear to have been settled or withdrawn.[54] It seems reasonable to assume

51. *Id.* at 877.

52. *Id.*

53. *Id.* at 884 (Gurfein, J., concurring and dissenting) (emphasis in original).

54. *Lewis v. Transamerica Corp.*, 575 F.2d 237 (9th Cir. 1978), *cert. granted*, ... U.S. ....., 99 S. Ct. 348 (1978); *Kusner v. First Pennsylvania Corp.*, 531 F.2d 1234 (3d Cir. 1976) and 74 F.R.D. 606 (E.D. Pa. 1977) (settled); *Jones v. Equitable Life Assurance Society*, CCH Fed. Sec. L. Rep. ¶ 94,986, 97,402 (S.D. N.Y. 1975) (settled); *Coper v. USF Investors*, U.S.D.C., S.D.N.Y., 73 Civ-2769-MP (settled); *Greenspan v. First Mortgage Investors*, U.S.D.C., S.D. Fla., 73-638-Civ-JE (dismissed); *Kramer v. Massachusetts Mutual Mortgage & Realty Investors*, U.S.D.C., S.D.N.Y., 73 Civ-1306 (settled); *Kreindler v. Citizens Mortgage Investment Trust*, U.S.D.C., S.D.N.Y., 73 Civ-1623 (settled); *Lerman v. ATICO Advisory Corp.*, U.S.D.C., S.D. Fla., 73-1172-Civ-JE, *dismissed on motion of the appellee*, 5th Cir., 74-2751 (unpublished); *Schreiber v. Northwestern Mutual Life Mortgage Realty Investors*, U.S.D.C., E.D. Wisc., 73 Civ. 1056 (withdrawn); *Uttrich v. Lomas & Nettleton Mortgage Investors*, U.S.D.C., D. Conn., Civ-15704 (withdrawn); *Greenspan v. Continental Mortgage Investors*, U.S.D.C., D. Mass., 72-1160-T (settled); *Mayer v. Chase Manhattan Mortgage and Realty Trust*, U.S.D.C., S.D.N.Y., 72 Civ-1623 (settled); *Mayer v. Wilson*, U.S.D.C., D. Conn., Civ. 76-1740-F (pending).

The respondent here, Harry Lewis, is the plaintiff in two other suits against advisers to real estate investment trusts. *See, Lewis v. Diversified Mortgage Investors*, U.S.D.C., S.D.N.Y., 75 Civ-1001 (settlement pending); *Lewis v. Guardian Mortgage Investors*, U.S. D.C., M.D. Fla., 73-851-Civ-JT (settled).

that one of the reasons for settlement may have been the recognition by the advisers and their counsel of the "sheer inability to disprove what a plaintiff says he *would have* done." This Court has recognized that investor claims often have settlement value out of all proportion to their inherent merit. See, *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 740-742 (1975).

The majorities in *Abrahamson, Wilson* and the court below have created what Judge Gurfein called "an analogue to Section 10(b)" without limits.

> "To create an analogue to Section 10(b) without the requirement that the 'fraud' be 'in connection with the purchase or sale' of a security hardly gives broad effect to the policy considerations so clearly expressed in the majority opinion of the Supreme Court in *Blue Chip Stamps* . . . The majority specifies no limits to the civil liability under § 206 . . . Yet, it is simply extending 10b-5 by resort to a different statute." *Abrahamson v. Fleschner*, 568 F.2d 862, 885 (2d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978) (Gurfein, J., concurring and dissenting).

The "purchaser-seller" limitation of Section 10(b) of the Securities Exchange Act is only one of several considerations relevant to determining the real-life effect of implying a private right of action under the Advisers Act. We do not know, for example, whether advice *negligently* given could

be the basis for a damage action by an investor.[55] The language of Section 206 of the Advisers Act suggests a requirement that the investor plaintiff plead and prove scienter. But prior to *Ernst & Ernst v. Hochfelder,* 425 U.S. 185 (1976), analogous language in Section 10(b) of the Securities Exchange Act did not prevent the lower courts from approving allegations of negligence.[56]

Implying a private right of action for money damages under the Advisers Act may be seen as an invitation to litigation—litigation to test the Act's meaning, application and outer limits. Even those commentators sympathetic to an implied right of action under the Advisers Act recognize the difficulties the federal courts would face in attempting to define and limit that right.[57] It may be sufficient to note that the majorities in *Abrahamson, Wilson* and the court below have created a private action for money damages based on language intended to guide equitable enforcement by the SEC.

CONCLUSION

There are good and substantial reasons why this Court should not approve a private action for money damages under the Investment Advisers Act.

The special language of the Act, the indications of Congressional intent, the alternate remedies available at common law, and the practical difficulties that would follow all support a conclusion that a private action for damages

55. *See generally, Ernst & Ernst v. Hochfelder,* 425 U.S. 185 (1976).

56. *See, e.g., White v. Abrams,* 495 F.2d 724, 730 (9th Cir. 1974); *Myzel v. Fields,* 386 F.2d 718, 735 (8th Cir. 1967), *cert. denied,* 390 U.S. 951 (1968); *Kohler v. Kohler Co.,* 319 F.2d 634, 637 (7th Cir. 1963).

57. *See,* Note, *Private Causes of Action Under Section 206 of the Investment Advisers Act,* 74 Mich. L. Rev. 308, 331-338 (1975).

under the Advisers Act was not intended, is not necessary, and would be unwise.

We respectfully pray an order of this Court *reversing* the decision of the court below.

Respectfully submitted,

JOHN M. ANDERSON
Counsel for Petitioners
450 Pacific Avenue
San Francisco, California 94133
Telephone: (415) 788-5000
Of Counsel
BRUCE W. HYMAN
MARY BETH UITTI
LANDELS, RIPLEY & DIAMOND
Counsel for Petitioners,
Transamerica Mortgage
Advisors, Inc. (TAMA)
Kent L. Colwell
J. Wendell Coombs
John R. Jensen
Ralph D. Wenger

R. BARRY CHURTON
NEIL L. SHAPIRO
COOPER, WHITE & COOPER
San Francisco, California
Counsel for Petitioner,
John Havens

JOSEPH MARTIN, JR.
PETTIT & MARTIN
San Francisco, California
Counsel for Petitioners,
Transamerica Corporation
Transamerica Land Capital, Inc.

JEROME I. BRAUN
JON F. HARTUNG
FARELLA, BRAUN & MARTEL
San Francisco, California
Counsel for Petitioner,
Mortgage Trust of America

January 2, 1979

Addendum A

Section 206, Investment Advisers Act of 1940; 54 Stat. 852, as amended, 74 Stat. 887, 15 U.S.C. § 80b-6:

§ 80b-6. Prohibited transactions by investment advisers.

It shall be unlawful for any investment adviser, by use of the mails or any means or instrumentality of interstate commerce, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud any client or prospective client;

(2) to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client;

(3) acting as principal for his own account, knowingly to sell any security to or purchase any security from a client, or acting as broker for a person other than such client, knowingly to effect any sale or purchase of any security for the account of such client, without disclosing to such client in writing before the completion of such transaction the capacity in which he is acting and obtaining the consent of the client to such transaction. The prohibitions of this paragraph shall not apply to any transaction with a customer of a broker or dealer if such broker or dealer is not acting as an investment adviser in relation to such transaction;

(4) to engage in any act, practice, or course of business which is fraudulent, deceptive, or manipulative. The Commission shall, for the purposes of this paragraph (4) by rules and regulations define, and prescribe means reasonably designed to prevent, such acts, practices, and courses of business as are fraudulent, deceptive, or manipulative.

Aug. 22, 1940, c. 686, Title II, § 206, 54 Stat. 852; Sept. 13, 1960, Pub.L. 86-750, §§ 8, 9, 74 Stat. 837.

Addendum B

Section 214, Investment Advisers Act of 1940; 54 Stat. 856, 15 U.S.C. § 80b-14:

§ 80b-14. Jurisdiction of offenses and suits.

The district courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have jurisdiction of violations of this subchapter or the rules, regulations, or orders thereunder, and, concurrently with State and Territorial courts, of all suits in equity to enjoin any violation of this subchapter or the rules, regulations, or orders thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enjoin any violation of this subchapter or rules, regulations, or orders thereunder, may be brought in any such district or in the district wherein the defendant is an inhabitant or transacts business, and process in such cases may be served in any district of which the defendant is an inhabitant or transacts business or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 225 and 347 of Title 28, and section 7, as amended, of the Act entitled "An Act to establish a court of appeals for the District of Columbia", approved February 9, 1893. No costs shall be assessed for or against the Commission in any proceeding under this subchapter brought by or against the Commission in any court.

Aug. 22, 1940, c. 686, Title II, § 214, 54 Stat. 856.

Addendum C

California

Ferro v. Citizens Nat. Trust & Sav. Bank, 44 Cal.2d 401, 282 P.2d 849 (1955)

Estate of McLaughlin, 43 Cal.2d 462, 274 P.2d 868 (1954)

Strauss v. Superior Court, 36 Cal.2d 396, 224 P.2d 726 (1950)

Neel v. Barnard, 24 Cal.2d 406, 150 P.2d 177 (1944)

Werschkull v. United California Bank, 85 Cal.App.3d 981, ... Cal.Rptr. ..... (Oct. 30, 1978, as modified Nov. 8, 1978)

Lix v. Edwards, 82 Cal.App.3d 573, 147 Cal.Rptr. 294 (1978)

Copley v. Copley, 80 Cal.App.3d 97, 145 Cal.Rptr. 437 (1978)

Estate of Collins, 72 Cal.App.3d 663, 139 Cal.Rptr. 644 (1977)

Estate of Howard, 58 Cal.App.3d 250, 122 Cal.Rptr. 836 (1977)

Estate of Wemyss, 49 Cal.App.3d 53, 122 Cal.Rptr. 134 (1975)

De Tarr v. Texaco Inc., 267 Cal.App.2d 872, 73 Cal.Rptr. 511 (1968)

Estate of Miller, 259 Cal.App.2d 536, 27 Cal.Rptr. 909 (1968)

Potter v. Moran, 239 Cal.App.2d 873, 49 Cal.Rptr. 229 (1966)

Coberly v. Superior Court, 231 Cal.App.2d 685, 42 Cal.Rptr. 64 (1965)

Wilson v. Wilson, 199 Cal.App.2d 542, 18 Cal.Rptr. 768 (1962)

Duncan v. Kahn, 151 Cal.App.2d 402, 311 P.2d 587 (1957)

Estate of Talbot, 141 Cal.App.2d 309, 296 P.2d 848 (1956)

Jones v. Stubbs, 136 Cal.App.2d 490, 288 P.2d 939 (1955)

Estate of Baird, 135 Cal.App.2d 343, 287 P.2d 372 (1955)
Estate of Vokal, 121 Cal.App.2d 252, 263 P.2d 64 (1953)
Estate of Keyston, 102 Cal.App.2d 223, 227 P.2d 17 (1951)
Estate of McCabe, 98 Cal.App.2d 503, 220 P.2d 614 (1950)
Weiner v. Mullaney, 59 Cal.App.2d 620, 140 P.2d 704 (1943)
Churchill v. Peters, 57 Cal.App.2d 521, 134 P.2d 841 (1943)

New York

Ray v. Marine Midland Grace Trust Company, 35 N.Y.2d 147, 359 N.Y.S.2d 28 (1974)
In Re Scarborough Properties Corp., 25 N.Y.2d 553, 307 N.Y.S.2d 641 (1969)
In Re Bond & Mortgage Guarantee Co., 303 N.Y. 423, 103 N.E.2d 721 (1952)
In Re Hubbell's Will, 302 N.Y. 246, 97 N.E.2d 888 (1951)
In Re Riding's Estate, 297 N.Y. 417, 79 N.E.2d 735 (1948)
In Re Durston's Will, 297 N.Y. 64, 74 N.E.2d 310 (1947)
In Re Hoyt's Estate, 294 N.Y. 373, 62 N.E.2d 609 (1945)
In Re Lewisohn, 294 N.Y. 596, 63 N.E.2d 589 (1945)
Albright v. Jefferson County Nat. Bank, 292 N.Y. 31, 53 N.E.2d 753 (1944)
In Re Ryan's Will, 291 N.Y. 376, 52 N.E.2d 909 (1943)
Marcellus v. First Trust and Deposit Co., 291 N.Y. 372, 52 N.E.2d 907 (1943)
City Bank Farmers Trust Co. v. Cannon, 291 N.Y. 125, 51 N.E.2d 674 (1943)
April v. April, 272 N.Y. 331, 6 N.E.2d 43 (1936)

Berardi v. W.T. Lane, Inc., 39 App.Div.2d 936, 333 N.Y.S.2d 226 (1972)
In Re Estate of Van Deusen, 37 App.Div.2d 131, 322 N.Y.S. 2d 951 (1971)

O'Hayer v. de St. Aubin, 30 App.Div.2d 419, 293 N.Y.S.2d 147 (1968)
In Re Cowles' Will, 22 App.Div.2d 365, 255 N.Y.S.2d 160 (1965)
In Re Alker's Estate, 20 App.Div.2d 894, 248 N.Y.S.2d 993 (1964)
Erbe v. Lincoln Rochester Trust Company, 13 App.Div.2d 211, 214 N.Y.S.2d 849 (1961)
In Re Bausch's Estate, 280 App.Div. 482, 115 N.Y.S.2d 278 (1952)
In Re Ahrens' Will, 275 App.Div. 588, 91 N.Y.S.2d 1 (1949)
City Bank Farmers Trust Co. v. Cannon, 264 App.Div. 429, 35 N.Y.S.2d 879 (1942)
In Re Osborn, 252 App.Div. 438, 299 N.Y.S. 593 (1937)
In Re Mann's Will, 251 App.Div. 739, 296 N.Y.S. 71 (1937)
In Re Kellogg's Trust, 35 Misc.2d 541, 230 N.Y.S.2d 836 (1962)
In Re Luce's Will, 224 N.Y.S.2d 210 (1961)
Application of Uran, 204 N.Y.S.2d 840 (1960)
In Re Geffen's Estate, 25 Misc.2d 734, 202 N.Y.S.2d 599 (1960)
In Re Arnay's Estate, 18 Misc.2d 266, 187 N.Y.S.2d 782 (1959)
In Re Kilmer's Will, 18 Misc.2d 60, 186 N.Y.S.2d 120 (1959)
In Re Law's Will, 17 Misc.2d 159, 181 N.Y.S.2d 516 (1958)
In Re Tannenbaum's Estate, 9 Misc.2d 95, 168 N.Y.S.2d 695 (1957)
London v. Goodman, 6 Misc.2d 277, 162 N.Y.S.2d 972 (1957)
In Re Haig's Estate, 3 Misc.2d 170, 149 N.Y.S.2d 66 (1956)
In Re Crawford's Will, 207 Misc. 145, 136 N.Y.S.2d 716 (1955)
In Re Bradley's Estate, 143 N.Y.S.2d 264 (1955)
In Re Dow's Will, 32 Misc.2d 415, 156 N.Y.S.2d 48 (1952)

In Re Schlussel's Trust, 203 Misc. 749, 117 N.Y.S.2d 48 (1952)

In Re Coyle's Estate, 200 Misc. 421, 104 N.Y.S.2d 260 (1951)

In Re Froehlich's Estate, 121 N.Y.S.2d 917 (1950)

In Re Peabody's Will, 198 Misc. 505, 96 N.Y.S.2d 556 (1950)

In Re Turner's Will, 108 N.Y.S.2d 964 (1950)

In Re Dayton's Estate, 84 N.Y.S.2d 318 (1949)

In Re Farrell's Will, 91 N.Y.S.2d 89 (1949)

In Re Murray's Will, 195 Misc. 629, 88 N.Y.S.2d 579 (1949)

Wolfer v. National City Bank of New York, 68 N.Y.S.2d 212 (1947)

In Re Smith's Estate, 188 Misc. 814, 65 N.Y.S.2d 457 (1946)

Lefkowitz v. Myer, 57 N.Y.S.2d 123 (1945)

City Bank Farmers Trust Co. v. Kops, 46 N.Y.S.2d 295 (1944)

In Re Wohl's Estate, 36 N.Y.S.2d 931 (1942)